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No. 31

In the Supreme Court of the United States

OCTOBER TERM, 1950

THE UNITED STATES OF AMERICA, APPELLANT

v.

MRS. MARIA MELITONA SANCHEZ AND ARMAND MOTA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

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THE UNITED STATES OF AMERICA, APPELLANT

v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court rendered no opinion on granting the judgment appealed from. The colloquy between court and counsel which preceded the entry of judgment appears at R. 4-6.

JURISDICTION

The judgment of the district court was entered on March 28, 1950. (R. 3.) The petition for appeal was presented to Mr. Justice Minton and allowed by him on April 27, 1950. (R. 7-8.) The

jurisdiction of this Court to review the case by direct appeal is conferred by 28 U.S.C. 1252. Probable jurisdiction was noted on June 5, 1950. (R. 12.)

QUESTION PRESENTED

Section 2590 (a) of the Internal Revenue Code imposes an excise tax upon transfers of marihuana. Subsection (1) provides that transfers to "special taxpayers", who have registered and paid a special occupational tax under other sections of the law, shall be taxed at the rate of $1 per ounce or fraction thereof. Subsection (2) levies a tax of $100 per ounce or fraction thereof upon transfers to all other persons.

The sole question presented is whether the tax imposed by subsection (2) is constitutional.

STATUTE INVOLVED

The pertinent statutory provisions are set out in the Appendix, pp. 33-41.

STATEMENT

On February 21, 1949, the United States brought this suit in the District Court for the Northern District of Illinois to collect taxes of $8,701.65, assessed against appellees on February 27, 1943, under Section 2590 (a)(2) of the Internal Revenue Code, upon transfers of marihuana made by them. (R. 1.) Appellees' answers denied on various grounds that they were liable for such taxes. (R. 2-3.) At the opening of the trial on March 28, 1950, appellees, relying on *Tovar* v. *Jarecki*, 173 F. 2d 449, in

which the Court of Appeals for the Seventh Circuit had held Section 2590 (a)(2) to be "a penal and not a revenue-raising statute * * * a penalty inflicted without a hearing and not a tax", moved to dismiss the complaint (R. 6). The district court, apparently regarding the *Tovar* case as an authoritative holding that Section 2590 (a)(2) is unconstitutional, granted the motion (R. 6), and an order was entered dismissing the complaint. (R. 3.)

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that Section 2590 (a)(2) of the Internal Revenue Code is unconstitutional.

2. In dismissing the complaint on the ground that Section 2590 (a) (2) of the Internal Revenue Code is unconstitutional.

SUMMARY OF ARGUMENT

The district court erred in dismissing the complaint on the ground that Section 2590 (a)(2) is unconstitutional. Although the court delivered no opinion, its ruling was apparently based on the ground that the tax imposed by that provision is invalid as a penalty. As the legislative history shows, Congress plainly intended the marihuana tax provisions, including that involved here, to serve a dual purpose: to raise revenue, and to discourage illicit use of the drug. But the latter is, constitutionally, an irrelevant circumstance. The decisions of this Court, extending from the early

days of the Republic to the present, establish that an otherwise valid tax is not rendered invalid because Congress was motivated by non-fiscal considerations in laying the tax. Nor is a tax open to attack on the ground that it has a regulatory or deterrent effect upon the activities taxed. It has been held in a host of cases that if a statute is on its face a lawful exercise of the taxing power, the courts will go no further in seeking, by collateral inquiry into the motives of Congress or the impact of the tax on the activities affected, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Constitution. Familiar examples are the cases sustaining the firearms, oleomargarine, and narcotics taxes.

Cases like the *Child Labor Tax Case*, 259 U. S. 20, and *United States* v. *Butler*, 297 U. S. 1, would appear to be out of harmony with these basic doctrines, which were established more than a century ago and have been reiterated as recently as *Sonzinsky* v. *United States*, 300 U. S. 506, and *Fernandez* v. *Wiener*, 326 U. S. 340. Whatever their present vitality, however, the former cases are distinguishable and have no bearing here. The statute involved here is on its face clearly a tax measure. This is not a case "where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations." *Sonzinsky*, *supra*, at 513. The regulatory features of the marihuana tax

provisions are clearly supportable as in aid of the revenue. Nor is the tax here conditioned upon a showing that the activities taxed are criminal or unlawful. Consequently, the rationale of cases like *United States* v. *Constantine*, 296 U. S. 287, and *Lipke* v. *Lederer*, 259 U. S. 557, has no application here. It is of no constitutional significance that a tax may have the same effect on the activities taxed as an outright statutory prohibition. This Court has made it clear beyond doubt that an otherwise valid tax is not to be annulled because it is penal in nature.

ARGUMENT

Section 2590 (a)(2) of the Internal Revenue Code Is Constitutional

1. *The statute.*

The only question presented on this appeal is whether the tax imposed by subsection (2) of Section 2590 (a) of the Internal Revenue Code is constitutional. That provision is part of a comprehensive statutory scheme established by Congress for the taxation of marihuana. Originally contained in the Marihuana Tax Act of 1937, 50 Stat. 551, these provisions now appear in the Internal Revenue Code (53 Stat., Part I, 26 U. S. C. 1946 ed.), Sections 2590 to 2604, and 3230 to 3239, inclusive.

Briefly, the marihuana tax provisions may be summarized as follows: Section 3230 requires all legitimate handlers of marihuana (manufacturers, importers, doctors, pharmacists, etc.) to pay a special occupational tax ranging from $1 to $24 an-

nually. Section 3231 requires such persons to register with the collector of internal revenue. Section 2591 makes it unlawful for any person, whether or not required to pay the special occupational tax, to transfer marihuana except in pursuance of a written order of the transferee, on an official form prescribed by the Secretary of the Treasury. Section 2591 (b) excepts certain kinds of transfers (e.g., to a patient by a physician or dentist in the course of professional treatment) from this order-form requirement.

Section 2590 (a) imposes an excise tax upon all transfers of marihuana required by Section 2591 to be carried out pursuant to written order forms. Subsection (1) levies a tax of $1 per ounce or fraction thereof on transfers to "special-taxpayers", who have paid the special occupational tax and registered under Sections 3230 and 3231. Subsection (2), the validity of which is here involved, taxes transfers to all other persons at the rate of $100 per ounce or fraction thereof. Section 2590 (b) provides that the transfer tax shall be paid by the transferee, but that if the transfer is made in violation of Section 2591 without an order form and without payment of the transfer tax, the transferor shall also be liable for such tax. Criminal penalties are provided in Sections 2596 and 3235 for manufacturing, producing, or dealing in marihuana without registering and paying the special occupational tax (Sec. 3234 (a)), for trans-

ferring marihuana without an official order form (Sec. 2591 (a)); and for acquiring marihuana without payment of the transfer tax (Sec. 2593).

As the committee reports state, Congress, in enacting the Marihuana Tax Act of 1937, had a dual purpose: "to employ the Federal taxing power to raise revenue from the marihuana drug traffic and to discourage the widespread use of the drug by smokers and drug addicts." H. Rep. No. 792, 75th Cong., 1st Sess., p. 1; S. Rep. No. 900, 75th Cong., 1st Sess., p. 3. Marihuana, the Senate Committee on Finance found, is a "dangerous drug" derived from the hemp plant, which, in addition to its proper medicinal and industrial uses, "is also used illicitly by smoking it in crudely prepared cigarettes, which are readily procurable in almsot all parts of the country at prices ranging from 10 to 25 cents each. Under the influence of this drug the will is destroyed and all power of directing and controlling thought is lost. Inhibitions are released. As a result of these effects, many violent crimes have been and are being committed by persons under the influence of this drug. Not only is marihuana used by hardened criminals to steel them to commit violent crimes, but it is also being placed in the hands of high-school children in the form of marihuana cigarettes by unscrupulous peddlers. Its continued use results many times in impotency and insanity.

"Two objectives have dictated the form of H.R. 6906: First, the development of a plan of taxation

which will raise revenue and at the same time render extremely difficult the acquisition of marihuana by persons who desire it for illicit uses and, second, the development of an adequate means of publicizing dealings in marihuana in order to tax and control the traffic effectively.

"This bill is modeled upon both the Harrison Narcotic Act and the National Firearms Act, which were designed to accomplish these same general objectives with respect to opium and cocoa leaves, and firearms, respectively." S. Rep. No. 900, *supra*, pp. 2-3. To substantially the same effect, see H. Rep. No. 792, *supra*, pp. 1-2.

2. *The grounds for the decision below.*

The district court granted appellees' motion to dismiss without delivering any opinion, oral or written. However, the grounds upon which Judge Barnes acted plainly appear from the colloquy between court and counsel which preceded entry of the order dismissing the complaint. (R. 4-6.) At the opening of the trial, Government counsel recalled to the court's attention the recent case of *Tovar* v. *Jarecki* in which the plaintiff had sought to enjoin the collector of internal revenue from collecting a transfer tax on marihuana, assessed pursuant to Section 2590 (a)(2). In that case Judge Barnes had dismissed the complaint. On appeal, however, the Court of Appeals for the Seventh Circuit reversed, holding that the section is "a penal

statute and not a tax statute" and hence that a court of equity could enjoin the collection of such a penalty, notwithstanding Section 3653 of the Internal Revenue Code, which prohibits suits to restrain the collection of taxes. (173 F. 2d 449, 451.)

Government counsel then stated, "on the assumption that your Honor will doubtless follow the Circuit Court of Appeals decision to the effect that this tax is a penalty, and unconstitutional", that he desired to make a prima facie case by putting in the assessment list and other evidence, so that if the Government should prevail on appeal, a remand might not be necessary. (R. 5.) After a brief discussion between court and counsel as to the reasons for the Government's failure to seek certiorari in the *Tovar* case, appellees' counsel made a formal motion to dismiss on the authority of that case. This motion was granted forthwith (R. 6), and an order to that effect was entered the same day (R. 3).

Clearly, therefore, even though the *Tovar* decision, strictly speaking, did not squarely adjudicate Section 2590 (a)(2) to be unconstitutional but only held it to be a penalty for purposes of Section 3653, the dismissal of the complaint in the present case was based on Judge Barnes's conclusion (to which he was led, it must be admitted, by the statements of Government counsel) that the *Tovar* case represented an authoritative precedent, binding upon him, that Section 2590 (a)(2) is unconstitutional

as imposing a penalty and not a tax. The reasoning of the Court of Appeals in the *Tovar* case is indicated by the following observations concerning the nature of the tax imposed by that section (173 F. 2d at 451):

> We think it quite plain that this statute is a penal and not a revenue-raising statute. If this plaintiff had been a licensed transferee, he would have had to pay a tax of $1 per ounce plus the charges for obtaining the license which taken together make a sizable amount and certainly would discourage the lawful use of this weed. But since the plaintiff was an unlicensed transferee, as claimed, he must pay $100 an ounce as a so-called tax. Does anyone suppose that the Government is trying to raise revenue in either instance? Is it not perfectly plain that what the Government is trying to do is to take this plaintiff's property and turn him and his family out on the street for not having a license to do something the Government did not want him to do? This the Government claims the right to do without notice or hearing and by means of its tax techniques when it could not convict for the same offense by a fair trial in a criminal proceeding.
>
> We hold that this section of the statute under which this plaintiff was assessed is a penal statute and not a tax statute. * * *

3. *The controlling principles established by decisions of this Court.*

First, some general considerations. The authority of Congress to levy taxes is found in Arti-

cle I, Section 8, clause 1 of the Constitution, which provides:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

The authority so conferred upon Congress "is exhaustive and embraces every conceivable power of taxation." *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 12. Early in its history this Court said that the taxing power of Congress is subject only to the three limitations explicitly contained in the Constitution: that Congress cannot tax exports (Art. I, Sec. 9); that indirect taxes must be uniform (Art. I, Sec. 8); and that direct taxes shall be apportioned (Art. I, Sec. 9). "With these exceptions, the exercise of the [taxing] power is, in all respects, unfettered." *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, 446. In that case the Court stated (p. 443):

> Where the power of taxation, exercised by Congress, is warranted by the Constitution, as to mode and subject, it is, necessarily, unlimited in its nature. Congress may prescribe the basis, fix the rates, and require payment as it may deem proper. Within the limits of the Constitution it is supreme in its action. No power of supervision or control is lodged in either of the other departments of the government.

Similarly, in the *License Tax Cases*, 5 Wall. 462, 471, Mr. Chief Justice Chase, speaking for the Court said:

> It is true that the power of Congress to tax is a very extensive power. It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.

In *Austin* v. *The Aldermen*, 7 Wall. 694, 699, this general principle was reiterated in broad terms:

> The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

Similar expressions are to be found in numerous cases. *E.g.*, *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548 ("The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected."); *Patton* v. *Brady, Executrix*, 184 U. S. 608, 623 ("* * * it is no part of the function of a court to inquire into the reasonableness of the excise either as respects the amount, or the property upon which it is imposed"); *Spencer* v. *Merchant*, 125 U. S. 345, 355; *Knowlton* v. *Moore*, 178 U. S. 41, 60; *Treat* v. *White*, 181 U. S. 264, 269; *Flint* v. *Stone Tracy Co.*,

220 U. S. 107, 158. Reviewing the earlier precedents, the Court's opinion in *McCray* v. *United States*, 195 U. S. 27, 59, summarized the basic constitutional principle as follows:

> Since, as pointed out in all the decisions referred to, the taxing power conferred by the Constitution knows no limits except those expressly stated in that instrument, it must follow, if a tax be within the lawful power, the exertion of that power may not be judicially restrained because of the results to arise from its exercise.

The general doctrine established in the above cases has been given specific application by the Court in its frequent rejection of the contention, again renewed in the present case, that a tax is unconstitutional because Congress was motivated by some non-fiscal considerations in levying the tax, or because it has a regulatory or deterrent effect upon the activities taxed. The Court has recognized that, in a sense, every excise is a regulation. "Any tax is a discouragement and therefore a regulation so far as it goes." *Pacific Fisheries* v. *Alaska*, 269 U. S. 269, 277. It may be admitted, as the legislative history reviewed above, pp. 7-8, makes clear, that, in addition to raising revenue, a purpose of Congress in enacting the Marihuana Tax Act of 1937 was "to discourage the widespread use of the drug by smokers and drug addicts." H. Rep. No. 792, 75th Cong., 1st Sess., p. 1; S. Rep. No. 900, 75th Cong., 1st Sess., p.

3. But it is now too settled for argument that such a regulatory purpose, or effect, of a tax does not render it invalid. The cases declaring and applying this principle are legion. The closest on its facts is probably *Sonzinsky* v. *United States*, 300 U. S. 506, involving the validity of Section 2 of the National Firearms Act, 48 Stat. 1236, which imposed a $200 annual license tax on dealers in firearms. Another section of the Act levied a tax of $200 on each transfer of a firearm, payable by the transferor. Like appellees here, Sonzinsky argued that the license tax was "not a true tax, but a penalty imposed for the purpose of suppressing traffic in a certain noxious type of firearms, the local regulation of which is reserved to the states because not granted to the national government"; and that "the cumulative effect on the distribution of a limited class of firearms, of relatively small value, by the successive imposition of different taxes" is to show the statute "to be prohibitive in effect and to disclose unmistakably the legislative purpose to regulate rather than to tax." (300 U. S. at 512-513.)

The Court flatly rejected this contention (pp. 513-514):

> * * * On its face it [the statute] is only a taxing measure, and we are asked to say that the tax, by virtue of its deterrent effect on the activities taxed, operates as a regulation which is beyond the congressional power.
>
> Every tax is in some measure regulatory.

> To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect, [citations]; and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. [citations]
>
> Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts. [citations] They will not undertake, by collateral inquiry as to the measure of the regulatory effect of a tax, to ascribe to Congress an attempt, under the guise of taxation, to exercise another power denied by the Federal Constitution. [citations]

Another familiar application of these principles is to be found in the oleomargarine tax cases. In *McCray* v. *United States*, 195 U. S. 27, the Court had before it a federal tax of one quarter of a cent per pound on uncolored oleomargarine, and ten cents per pound if colored to resemble butter. It was obvious that reasons other than fiscal necessities had induced Congress to fix the rate forty times higher in the case of colored oleomargarine. The tax was nevertheless sustained as a proper excise. The fact that the measure was on its face a tax statute was considered sufficient to preclude any inquiry into whether Congress acted for non-

fiscal motives. Mr. Justice White wrote for the Court (pp. 56, 59):

> The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. * * *
>
> * * * * *
>
> It being thus demonstrated that the motive or purpose of Congress in adopting the acts in question may not be inquired into, we are brought to consider the contentions relied upon to show that the acts assailed were beyond the power of Congress, putting entirely out of view all considerations based upon purpose or motive.
>
> Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect are to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power.

Similarly, *Magnano Co.* v. *Hamilton*, 292 U. S. 40, upheld a statute of the State of Washington laying a special excise tax on oleomargarine and other butter substitutes. Citing *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 24, Mr. Justice Sutherland's opinion for a unanimous Court stated (p. 44): "Except in rare and special instances, the due process of law clause contained in the Fifth

Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution." (Accord: *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48-49; *McCray* v. *United States*, 195 U. S. 27, 63.) The opinion continued: "Collateral purposes or motives of a legislature in levying a tax of a kind within the reach of its lawful power are matters beyond the scope of judicial inquiry." (*Id.*) See also *In re Kollock, Petitioner*, 165 U. S. 526.

The same principle has been applied to sustain the validity of the Federal Anti-Narcotic Act (38 Stat. 785). *United States* v. *Doremus*, 249 U. S. 86, and *Nigro* v. *United States*, 276 U. S. 332. The question in those cases was the validity of the order-form requirements of the Act. In sustaining those requirements as appropriate regulatory adjuncts in a revenue measure, the Court treated as not open to question the validity of Section 1 of the Act, which imposed an occupation tax on handlers of certain narcotics, required that they register, and imposed a stamp tax on sales of such drugs. It was not the validity of that section, but only of succeeding sections which was challenged in the *Doremus* and *Nigro* cases. These latter provisions were upheld as proper administrative regulations in aid of the basic tax. In *Doremus* the Court frankly recognized that the statute had "a moral end as well as revenue in view." (249 U. S. at 94.) But this fact was deemed irrelevant to its constitutionality (pp. 93-94):

> And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the Constitution, it cannot be invalidated because of the supposed motives which induced it. * * *
>
> The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue.

See also *Alston* v. *United States*, 274 U. S. 289, sustaining the validity of the stamp tax imposed by Section 1 of the Anti-Narcotic Act.

Numerous additional authorities may be cited to support the proposition that a tax is not rendered invalid because, in addition to raising revenue, it is intended to further a social or economic policy deemed desirable by Congress. In *Billings* v. *United States*, 232 U. S. 261, the Court sustained a tax upon the use of foreign-built yachts, although domestic yachts were not subject to tax. The obvious intent to foster domestic shipbuilding did not invalidate the statute. A similar motive to protect American producers and manufacturers against the competition of foreigners was revealed on the face of the protective tariff act sustained in *Hampton & Co.* v. *United States*, 276 U. S. 394. In rejecting the contention that the power of Congress in levying custom duties might be exercised only

for revenue purposes, the Court said (pp. 412-413):

> So long as the motive of Congress and the effect of its legislative action are to secure revenue for the benefit of the general government, the existence of other motives in the selection of the subjects of taxes can not invalidate Congressional action. * * *
>
> * * * the fact that Congress declares that one of its motives in fixing the rates of duty is so to fix them that they shall encourage the industries of this country in the competition with producers in other countries in the sale of goods in this country, can not invalidate a revenue act so framed. * * *

Accord: *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48; *Crocker* v. *Malley*, 249 U. S. 223, 234.

Another illustration is furnished by Section 412 of the Revenue Act of 1928 (45 Stat. 791, 964), which imposed a tax upon theater tickets sold at places other than the ticket office at a rate of 5 per cent of the amount of the premium, where such premium was 75 cents or less, and at the rate of 50 percent of the entire amount of the premium, where it exceeded 75 cents. The obvious purpose and effect of the tax was to discourage so-called ticket scalpers from charging a premium of more than 75 cents. The statute was sustained in *McKenna* v. *Anderson*, 31 F. 2d 1016 (C.A. 2), and this Court denied certiorari, 279 U. S. 869. See also *Alexander Theater Ticket Office* v. *United States*, 23 F.

2d 44 (C.A. 2); *Apollo Operating Corporation* v. *Anderson*, 55 F. 2d 66 (C.A. 2).

Succinctly put, all of these cases exemplify the principle stated in *Fernandez* v. *Wiener*, 326 U.S. 340, 362, as follows:

> Undoubtedly every tax which lays its burden on some and not others may have an incidental regulatory effect. But since that is an inseparable concomitant of the power to tax, the incidental regulatory effect of the tax is embraced within the power to lay it. It has long been settled that an Act of Congress which on its face purports to be an exercise of the taxing power, is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed. In such a case it is not within the province of courts to inquire into the unexpressed purposes or motives which may have moved Congress to exercise a power constitutionally conferred upon it.

It is obvious that almost every tax is designed to further some economic, social or moral policy of the legislature, in addition to the general purpose of producing revenue. Thus, the allowance of deductions for charitable contributions reflects a legislative purpose of encouraging taxpayers to make such gifts. The imposition, in wartime and similar periods, of prohibitively high excise taxes upon luxuries is manifestly intended to limit the manufacture and use of such products. The high tax on undistributed corporate profits is primarily de-

signed to force corporations to distribute earnings. Similarly, the comparatively heavy taxes on alcoholic beverages and tobacco undoubtedly reflect a legislative judgment as to the social or moral value of such products. Yet, so long as the legislative policy is embodied in the form of a tax, it is constitutional; and the circumstance that the tax has a collateral non-fiscal purpose or effect has no bearing on its validity. As this Court said in *Magnano Co.* v. *Hamilton*, 292 U. S. 40, 47:

> From the beginning of our government, the courts have sustained taxes although imposed with the collateral intent of effecting ulterior ends, which, considered apart, were beyond the constitutional power of the lawmakers to realize by legislation directly addressed to their accomplishment. * * *

It would be a pernicious doctrine, indeed one practically impossible of application, if the contrary had been held. Perhaps the classic statement of the controlling principle is made by Mr. Justice Story in his *Commentaries on the Constitution*, 5th Ed., Vol. 1, Sec. 965:

> The absolute power to lay taxes includes the power in every form in which it may be used, and for every purpose to which the legislature may choose to apply it. This results from the very nature of such an unrestricted power. *A fortiori* it might be applied by Congress to purposes for which nations have been accustomed to apply it. Now, nothing is more clear,

> from the history of commercial nations, than the fact that the taxing power is, often, very often, applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles for the encouragement and protection of domestic products and industry; for the support of agriculture, commerce, and manufactures; for retaliation upon foreign monopolies and injurious restrictions; for mere purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes as a bounty upon an infant manufacture or agricultural product; sometimes as a temporary restraint of trade; sometimes as a suppression of particular employments; sometimes as a prerogative power to destroy competition and secure a monopoly to the government!

See also *id.*, Sec. 973:

> So that, whichever construction of the power to lay taxes is adopted, the same conclusion is sustained, that the power to lay taxes is not by the Constitution confined to purposes of revenue. In point of fact, it has never been limited to such purposes by Congress; and all the great functionaries of the government have constantly maintained the doctrine that it was not constitutionally so limited.

In addition to the cases already cited, see *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 585-598; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, 48; *Helvering* v.

Mitchell, 303 U. S. 391, 398-405; and *Helvering v. Nat. Grocery Co.*, 304 U. S. 282, 288-289.

The cases that appellees may rely upon in contending that the tax levied by Section 2590 (a)(2) is unconstitutional as a penalty fall into two categories. The first is exemplified by the *Child Labor Tax Case*, 259 U. S. 20. In that case it was held that the statute showed *on its face* that it was not a revenue measure, and that the tax was a penalty for wilful failure to comply with a comprehensive and detailed scheme of federal regulation of child labor deemed beyond the powers of Congress. The statute exempted from tax employers who did not know that the persons employed by them were under the prescribed age. The rationale of that case was thus stated in *Nigro v. United States*, 276 U. S. 332, 353:

> * * * Congress by merely calling an Act a taxing act can not make it a legitimate exercise of taxing power under Section 8 of Article I of the Federal Constitution, if in fact the words of the act show clearly its real purpose is otherwise.

Similarly, in *Carter v. Carter Coal Co.*, 298 U. S. 238, no attempt was made to support the Act as a revenue measure. Its validity rested admittedly upon its status as an effort to regulate interstate commerce and matters affecting interstate commerce in bituminous coal. The tax on its face was a means of securing adherence to a code of regu-

lations which themselves carried penalties enforceable by the Federal Government. In the same category is *Hill* v. *Wallace*, 259 U. S. 44.

In *United States* v. *Butler*, 297 U. S. 1, the validity of the tax as such was not involved. The question was the validity of the use of the funds derived from the tax. Since the Court held that the funds were used to coerce or purchase compliance with an invalid scheme of regulation, and since the tax was held to be an integral part of the Act, the tax fell.

It is doubtful whether these last-cited cases are in harmony with the basic constitutional doctrine limiting the extent to which courts will scrutinize revenue measures in order to ascertain whether Congress was motivated by non-fiscal considerations in laying the tax. In any event, whatever their present vitality, these cases are distinguishable and have no application here. Like *Sonzinsky* v. *United States*, 300 U. S. 506, 513, this case "is not one where the statute contains regulatory provisions related to a purported tax in such a way as has enabled this Court to say in other cases that the latter is a penalty resorted to as a means of enforcing the regulations." The statute involved here is on its face clearly a tax measure. The registration and order-form provisions, like those upheld in the National Firearms Act and the Anti-Narcotic Act, are "obviously supportable as in aid of a revenue purpose". *Sonzinsky* v. *United States*, *supra*, at 513; *United States* v. *Doremus*,

249 U. S. 86, 94; *Nigro* v. *United States*, 276 U. S. 332, 353-354.

The second group of cases on which appellees may rely is represented by *Lipke* v. *Lederer*, 259 U. S. 557, and *United States* v. *Constantine*, 296 U. S. 287. Cf. *Regal Drug Co.* v. *Wardell*, 260 U. S. 386; *United States* v. *LaFranca*, 282 U. S. 568. However, those cases are distinguishable because the subject of the tax there held invalid as a penalty was described or treated as criminal by the taxing statute. In those cases the tax was found to be in the nature of an additional punishment for the act made criminal by the statute. Section 35 of the National Prohibition Act (41 Stat. 305), involved in *Lipke* v. *Lederer*, *supra*, assessed a tax in double the amount otherwise provided by law, together with "an additional penalty" of $500 on retail dealers and $1,000 on manufacturers, upon persons illegally manufacturing or selling liquor in violation of section 29 of the Act. The Court's opinion pointed out (p. 562): "Evidence of crime (§ 29) is essential to assessment under § 35. It lacks all the ordinary characteristics of a tax, whose primary function 'is to provide for the support of the government' and clearly involves the idea of punishment for infraction of the law—the definite function of a penalty." Similarly, the tax invalidated in *United States* v. *Constantine*, *supra*, was one where the "condition of the imposition is the commission of a crime", which the Court

held to be "a penalty for the violation of state law, and as such beyond the limits of federal power." (296 U. S. at 294-295.)

The rationale of the *Lipke* and *Constantine* cases would appear to have been substantially undermined by subsequent decisions of this Court. Thus, in *Helvering* v. *Mitchell*, 303 U. S. 391, the question was whether Section 293 (b) of the Revenue Act of 1928 (45 Stat. 791), imposing an additional 50 per cent tax where there was fraud with intent to evade the income tax, was unconstitutional as a criminal penalty in violation of the double jeopardy clause. In upholding the provision as a legitimate exercise of the taxing power, the Court pointed out that Congress could impose both a criminal and a civil sanction in respect to the same act or omission. The Court held that sanctions imposing additions to a tax are of a "remedial character" because they "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud." (303 U. S. at 401.) The fact that Congress provided a "distinctly civil procedure" (i.e., collection by distraint as well as by judicial proceedings in court), the Court stated (p. 402), "indicates clearly that it intended a civil, not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for

the enforcement of remedial sanctions, those rules and guarantees do not apply."

Similarly, in *Helvering* v. *National Grocery Co.*, 304 U. S. 282, it was contended that Section 104 of the Revenue Act of 1928 (45 Stat. 814) providing a 50 per cent additional tax on corporations accumulating earnings in excess of reasonable business needs, was unconstitutional "because the liability imposed is not a tax upon income, but a penalty designed to force corporations to distribute earnings" (p. 288). Citing the *Mitchell* case, the Court summarily rejected this contention: "The penal nature of the imposition does not prevent its being valid, as the tax was otherwise permissible under the Constitution." (304 U. S. at 288-289.)

In the present case, the tax laid by Section 2590(a)(2) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Section 3230 and 3231. Such a transfer is not made a crime by the statute, nor is the tax conditioned upon its being shown that the transfer is made criminal or unlawful by other provisions of law. The only transfers made unlawful by the Act are (1) a transfer not in pursuance of an official order form (Sec. 2591); and (2) a transfer *by* a person who has not paid the special tax and registered (Sec. 3234). Acquisition of the drug by any person without having paid the transfer tax is also unlawful (Sec. 2593). It is thus the failure to pay the tax, either the special or trans-

fer tax, or the acquisition of the drug without a proper order form, which gives rise to criminal liability, and not, as in the *Lipke* and *Constantine* cases, the criminal liability which gives rise to the tax.

It is a constitutional irrelevance, therefore, that the $100 per ounce tax levied by Section 2590 (a)(2) may have a prohibitory effect upon transfers of marihuana to unregistered persons. If Congress can prohibit the transfer of drugs to other than legitimate handlers, as it in effect did under the Anti-Narcotic Act upheld in *Nigro v. United States*, 276 U.S. 332, it cannot be an objection to a tax that its effect may be the same as an outright statutory prohibition. If otherwise valid under the Constitution, a tax does not become bad because it is penal in nature. The taxing power clearly permits the imposition of penalties, civil as well as criminal, in aid of collection of revenue. If it had seen fit to do so, Congress could have imposed an absolute prohibition, enforceable by criminal penalties, upon transfers of marihuana to unregistered persons. Such a provision would have been clearly constitutional as ancillary to enforcement of the special occupational tax under Section 3230 and the $1 per ounce transfer tax under Section 2590 (a)(1). That Congress chose instead to impose a $100 per ounce tax, which would not only accomplish the same result but also provide an additional source of revenue, does not alter the essential validity of its action as an exercise of the taxing power.

Moreover, it should be pointed out in the present case that, like the tax sustained as a civil sanction in the *Mitchell* case, the tax here is collectible by a distinctly civil procedure. The tax is paid by affixing appropriate stamps to the order form (sec. 2590 (c)); and the Commissioner makes assessments for unpaid taxes (sec. 3311), which may be collected by distraint or court proceedings (sec. 3312 (d)).

The civil character of the tax imposed by subsection (2) of Section 2590 (a) is not defeated by the fact that its amount is very high in relation to that imposed by subsection (1). The cases previously cited (pp. 11-20) make it clear that a tax laid upon a proper subject of taxation is not to be condemned because of its amount. In any event, Congress was fully justified in fixing a higher tax upon transfers of marihuana to persons who had not registered under the law and paid the special occupational tax. It is obviously unlikely that such persons will voluntarily report the transfer to the collector and pay the tax due. The higher rate of tax, as in the *Mitchell* case (*supra*, at p. 401), was provided "primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."[1] The reasons for levying a

[1] Indeed, a tax which is merely nominal in amount might possibly be more vulnerable. See *Nigro* v. *United States*, 276 U.S. 332, 346-347, 353.

higher tax upon transfers to a class of taxpayers such as are involved here were fully and cogently set forth in Mr. Justice Cardozo's dissenting opinion, joined by Mr. Justice Brandeis and Mr. Justice Stone, in *United States* v. *Constantine*, 296 U. S. 287, 297-298:

> Congress may reasonably have believed that, in view of the attendant risks, a business carried on illegally and furtively is likely to yield larger profits than one transacted openly by law-abiding men. Not repression, but payment commensurate with the gains is thus the animating motive. * * * Congress may also have believed that the furtive character of the business would increase the difficulty and expense of the process of tax collection. The Treasury should have reimbursement for this drain on its resources. Apart from either of these beliefs, Congress may have held the view that an excise should be so distributed as to work a minimum of hardship; that an illegal and furtive business, irrespective of the wrongdoing of its proprietor, is a breeder of crimes and a refuge of criminals; and that in any wisely ordered polity, in any sound system of taxation, men engaged in such a calling will be made to contribute more heavily to the necessities of the Treasury than men engaged in a calling that is beneficent and lawful.
>
> Thus viewed, the statute was not adopted to supplement or sanction the police powers of the states or of their political subdivisions. It was adopted, for anything disclosed upon

> its face or otherwise, as an appropriate instrument of the fiscal policy of the nation. The business of trading in things contraband is not the same as the business of trading in legitimate articles of commerce. Classification by Congress according to the nature of the calling affected by a tax (*State Board of Tax Commissioners* v. *Jackson*, 283 U. S. 527) does not cease to be permissible because the line of division between callings to be favored and those to be reproved corresponds with a division between innocence and criminality under the statutes of a state. * * * By classifying in such a mode Congress is not punishing for a crime against another government. It is not punishing at all. It is laying an excise upon a business conducted in a particular way with notice to the taxpayer that if he embarks upon that business he will be subjected to a special burden. What he pays, if he chooses to go on, is a tax and not a penalty.[2]

CONCLUSION

The tax imposed by Section 2590 (a)(2) is clearly constitutional, and the district court erred

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[2] It may be relevant to note (cf. *Sonzinsky* v. *United States*, 300 U.S. 506, 514; *Nigro* v. *United States*, 276 U.S. 332, 353) that the marihuana transfer tax imposed by Section 2590 (a) has produced some revenue. In the fiscal year ending June 30, 1949, the $100 per ounce taxes under subsection (b) totalled $5,554.90, while the $1 per ounce levies under subsection (a) amounted to $823.86. See *Annual Report of the Commissioner of Internal Revenue, Fiscal Year Ended June 30, 1949*, pp. 98-99. The comparable figures for the two preceding fiscal years were $7,120.35 and $1,061.96, and $8,267.35 and $2,275.43, respectively. *Id., Fiscal Year Ended June 30, 1948*, pp. 92-93; *id., Fiscal Year Ended June 30, 1947*, pp. 86-87.

in dismissing the complaint. The judgment of the district court should be reversed, and the case remanded to that court for further proceedings.

Respectfully submitted.

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APPENDIX

Internal Revenue Code (26 U. S. C. 1946 ed.):

SEC. 2590. TAX.

(a) *Rate.*—There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:

(1) *Transfers to special taxpayers.*—Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, $1 per ounce of marihuana or fraction thereof.

(2) *Transfers to others.*—Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, $100 per ounce of marihuana or fraction thereof.

(b) *By Whom Paid.*—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 2591 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

(c) *How paid*—(1) Stamps.—Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary.

* * * * *

SEC. 2591. ORDER FORMS.

(a) *General Requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

(b) *Exceptions.*—Subject to such regulations as the Secretary may prescribe, nothing contained in this section shall apply—

(1) *Professional practice.*—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of two years from the date of the transfer of such marihuana, and subject to inspection as provided in section 2595.

(2) *Prescriptions.*—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231: *Pro-*

vided, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: *Provided, further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, agents, employees, and officials mentioned in section 2595.

(3) *Exportation.*—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) *Government and State officials.*—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Govern-

ment, State, Territorial, District, county, or municipal or insular hospitals or prisons.

* * * * *

SEC. 2593. UNLAWFUL POSSESSION.

(a) *Persons in General.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

* * * * *

SEC. 2596. PENALTIES.

Any person who is convicted of a violation of any provision of this subchapter or Part VI of subchapter A of chapter 27 shall be fined not more than $2,000 or imprisoned not more than five years, or both, in the discretion of the court.

SEC. 3230. TAX.

(a) *Liability and time for payment of tax.*—Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away mari-

huana shall (1) before engaging in any of the above-mentioned activities, and (2) thereafter, on or before July 1 of each year, pay the following special taxes respectively:

(1) *Importers, manufacturers, and compounders.*—

Importers, manufacturers, and compounders of marihuana, $24 per year.

(2) *Producers.*

Producers of marihuana (except those included within subdivision (4) of this subsection), $1 per year, or fraction thereof, during which they engage in such activity.

(3) *Physicians, dentists, veterinary surgeons, and other practitioners.*

Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 per year or fraction thereof during which they engage in any of such activities.

(4) *Persons engaged in research, instruction, or analysis.*

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 per year, or fraction

thereof, during which he engages in such activities.

(5) *Persons not otherwise taxed.*

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 per year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by subdivisions (1) and (2) of this subsection, may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section.

* * * * * *

SEC. 3231. REGISTRATION.

(a) *In General.*—

Any person subject to the tax imposed by section 3230 shall, upon payment of such tax, register his name or style and his place or places of business with the collector of the district in which such place or places of business are located.

* * * * * *

SEC. 3234. UNLAWFUL ACTS IN CASE OF FAILURE TO REGISTER AND PAY SPECIAL TAX.

(a) *Trafficking.*—

(1) *Liability.*—It shall be unlawful for any person required to register and pay the

special tax under the provisions of sections 3230 and 3231 to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax.

(2) *Enforcement of liability.*

In any suit or proceeding to enforce the liability imposed by this section or sections 3230 and 3231, if proof is made that marihuana was at any time growing upon land under the control of the defendant, such proof shall be presumptive evidence that at such time the defendant was a producer and liable under this section as well as under Sections 3230 and 3231.

(b) *Transportation.*—

It shall be unlawful for any person who shall not have paid the special tax and registered, as required by sections 3230 and 3231, to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession, or from any State, Territory, the District of Columbia, any insular possession of the United States, or the Canal Zone, into any other State, Territory, the District of Columbia, or insular possession of the United States: *Provided*, That nothing contained in this section shall apply to any common carrier engaged in transporting marihuana; or to any employee of any person who shall have registered and paid the special tax as required by sections 3230 and

3231 while acting within the scope of his employment; or to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231, who has been employed to prescribe for the particular patient receiving such marihuana; or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

SEC. 3235. PENALTIES.

For penalties for violating or failing to comply with any of the provisions of this part, see section 2596.

SEC. 3311. ASSESSMENT OF UNPAID TAXES PAYABLE BY STAMP.

Whenever any article upon which a tax is required to be paid by means of a stamp is sold or removed for sale by the manufacturer thereof, without the use of the proper stamp, in addition to the penalties imposed by law for such sale or removal, it shall be the duty of the Commissioner, within a period of not more than four years (except as provided in section 3312) after such removal or sale, upon such information as he can obtain, to estimate the amount of the tax which has been omitted to be paid, and to make an assessment therefor upon the manufacturer or producer of such article. He shall certify such assessment to the collector, who shall immediately demand payment of such tax, and upon the neglect or

refusal of payment by such manufacturer or producer, shall proceed to collect the same in the manner provided for the collection of other assessed taxes.

SEC. 3312. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

* * * * *

(d) *Collection after assessment.*

Where the assessment of any tax imposed by this title has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun—

(1) Within six years after the assessment of the tax, or

(2) Prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer.

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